No. 16102

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 839, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 370,
Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

APPELLANTS' PETITION FOR REHEARING EN BANC

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THE ARGUS PRESS, SEATTLE

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United States Court of Appeals
For the Ninth Circuit

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Appeal from the United States District Court for the Eastern District of Washington Southern Division

APPELLANTS' PETITION FOR REHEARING EN BANC

To the Honorable Circuit Judges Stephens, Barnes and Hamlin:

As provided by Rule 23 of the court, the appellants file this their petition for hehearing *en banc.*

At the outset, we assure your Honors that nothing we may say critical of the decision filed on July 27, 1959 is intended to be or should be understood as disrespectful to the court or to the judge who wrote that opinion.

By this petition we expect to convince your Honors:

1. That the court has misunderstood or misconstrued the pleadings.

2. That the court has incorrectly construed many facts to which the opinion makes reference.

3. That the court has wholly failed to notice many undisputed vital facts which, if stated, would compel a reversal rather than an affirmance of the judgment.

4. That the court has erroneously decided not one but several important questions of Federal law arising out of the constitution itself as well as out of several acts of Congress. Some of these Federal statutes the court has mentioned but misconstrued and misapplied. Others the court has not noticed at all although applicable to the admitted facts and called to the court's attention in the briefs.

5. That as to the question involving the jurisdiction of the District Court to render a joint and several judgment, the decision is in direct conflict with the express language of Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C.A. § 185). It is also in direct conflict with Rule 20-a of Federal Rules of Civil Procedure. Moreover, the decision of this court is in direct conflict with the decision of the Court of Appeals of the Second Circuit construing Section 301 and with the decision of the Court of Appeals of the District of Columbia construing Rule 20-a pursuant to which the plaintiff (appellee) was authorized to join the two local unions in a single action. These decisions were called to the attention of the court in the appellants' briefs but as to them the opinion is completely silent.

Because of some of the discussion in the opening paragraphs of the opinion, it is necessary that we refer to the pleadings to some extent. The action was started

by a complaint filed on May 8, 1956 (Tr. 3-12), while the strike or lockout, whichever it was, was still in progress. The case was tried on the issues made by an amended complaint filed later, on November 9, 1956, and the separate answers of defendants (appellants) filed on December 13, 1956 and December 19, 1956 (Tr. 21-31).

The original complaint, though superseded by the amended complaint, was included in the printed transcript of record for one reason only. It described the two contracts between Associated General Contractors and the two local unions. Copies of those two contracts, together with a copy of a certain letter dated April 27, 1956 written by plaintiff's (appellee's) counsel to the two local unions, were attached to that original complaint as Exhibits A, B and C, and on the trial became Exhibits 2, 3 and 50. The amended complaint merely identified these exhibits by reference to the original complaint. For that reason, and that reason only, the original complaint was included in the printed transcript of record (Tr. 3-12).

Two separate and distinct labor contracts were described in the original complaint and by reference made a part of the amended complaint.

One was a contract between Associated General Contractors and Teamsters Local 839, dated December 19, 1955 (Ex. 2). The Engineers Local 370 is not a party to that contract. The other was a contract between Associated General Contractors and Engineers Local 370, dated December 24, 1955 (Ex. 3). Teamsters Local 839 is not a party to that contract.

In addition to the two local unions that executed those contracts, the plaintiff (appellee) also, in both complaints, joined as defendants Western Conference of Teamsters and Joint Council of Teamsters No. 28. Western Conference of Teamsters is a distinct organization which, as its name implies, carries on certain activities in the thirteen western states, namely, Washington, Oregon, California, Idaho, Nevada, Arizona, Utah, Montana, New Mexico, Wyoming, Colorado, Alaska and Hawaii, and also in three western provinces of Canada.

Joint Council of Teamsters No. 28 is another distinct labor organization whose activities are limited to the State of Washington. Neither Western Conference of Teamsters nor Joint Council of Teamsters No. 28 was a party to either of the contracts (Ex. 2 and 3) executed by the local unions. Nevertheless, the plaintiff (appellee) attempted to hold both of them liable for the alleged breaches of the contracts executed by the two local unions only.

In paragraph II of its amended complaint, the plaintiff (appellee) identified the four labor organizations joined the defendants (Tr. 13-14). By paragraph III of that complaint (Tr. 14-15), the plaintiff (appellee) specifically invoked jurisdiction under Section 301 of the Labor Management Act of 1947 (29 U.S.C.A. § 185) which grants a special and limited jurisdiction to United States District Courts over

> "Suits for violation of contracts between an employer and a labor organization representing employees . . . without respect to the amount in con-

troversy or without regard to the citizenship of the parties."

Obviously counsel for the plaintiff (appellee) in drafting both complaints was well aware of that restricted jurisdiction. But, in an effort to ostensibly state a cause of action against those two defendants not parties to either contract, the complaints had to make some allegations which plaintiff's (appellee's) counsel thought might possibly be suffiicent to state a claim against them. To that end, the amended complaint alleged that *all four* of the defendant labor unions (two that executed the contracts and two that did not) acted in concert to bring about the work stoppage.

Paragraph VI of the amended complaint (Tr. 17-20) alleged that the two local unions acted jointly and then charged that they so acted "after first receiving the sanction, approval and consent of Joint Council No. 28 and Western Conference,". The same paragraph then alleged that the strike or lockout, whichever it was, continued until June 6, 1956, "at which time the defendants (obviously meaning all four defendants) previously identified and described) agreed to resume work." Further on in the same paragraph it is stated "that the plaintiff herein claims a right to recover from the defendants, as part of the damage sustained by it and as hereinafter mentioned, all sums paid to the membership of the defendants for isolation pay, etc." In the following paragraph VII of the amended complaint (Tr. 20) the effort to state a cause of action against Western Conference of Teamsters and Joint Council of Teamsters No. 28 is again indicated by the

allegation of "inducing such breach by defendants as heretofore alleged" (Tr. 20). That allegation relative to "inducing" obviously is directed at the two defendants not parties to the contracts.

It is entirely clear that the allegations of the amended complaint quoted on page 2 of the opinion concerning concert of action were directed to the two defendant labor organizations not parties to the contracts. These allegations would be appropriate and necessary if the plaintiff (appellee) was suing for damages caused by an unlawful conspiracy or combination between all four defendants to unjustifiably obstruct the prosecution of this work, contract or no contract. They have no relevancy if, as appellants claim and the court's opinion inferentially concedes, Section 301 of the Labor Management Act of 1947 confers no jurisdiction whatever on the District Court to deal with anything other than "suits for violation of contracts" as that section states in words too plain to be misunderstood.

The trial of the liability issue commenced on June 10, 1957 (Tr. 179). Immediately counsel representing the three Teamster unions moved to dismiss the action as to Joint Council of Teamsters No. 28 and Western Conference of Teamsters for the reason that the amended complaint wholly failed to state any cause of action against either of them within the jurisdiction defined by Section 301 of the Labor Management Act of 1947 (Tr. 181-182). The court took that motion under advisement and proceeded with other matters. Upon the convening of court on the following day that motion to dismiss was granted. At that time, and before

the motion was granted, counsel for the plaintiff (appellee) stated:

> "It is my conception, if your Honor please, that the determination of whether that motion is good or whether it is bad must be determined by the pleadings, since it is made upon the pleadings and based upon the fact that we in our complaint have alleged that we have prosecuted this action and do prosecute it under Section 301 of the Taft-Hartley Act.
>
> "I do not wish to concede the motion. As far as these defendants are concerned, I am frank to state to your Honor, however, that I do not believe that under the allegations of the complaint we have alleged a specific contract with the Joint Council or with the Western Conference. We have only alleged as to those two defendants that they acted in concert with the Teamsters Local and, in effect, authorized, after requested to do so, and participated in the strike itself, and I conceive that that type of action is, as Mr. Carey pointed out, possibly one in tort and not in contract, as inducing a breach or participating in a breach of contract.
>
> "Therefore, without conceding the motion, I submit the matter to the Court under the Section 301. It is a new act, it is one that has not been too greatly construed by the courts, and I don't find any case in which this precise point—well, yes, there is one case in which this precise point was raised—and in that case the court held that, since there was no contractual relationship shown, the parent organization, so to speak, could not be held liable." (Tr. 263-264)

The motion was then granted, the trial judge stating:

> "I can't conceive of how a party could be sued or would be liable for breach of contract without being a party to the contract." Tr. 265)

See also "Stipulation Re Dismissal of Joint Teamsters No. 28 and Western Conference of Teamsters" dated June 19, 1957 (Tr. 121-122). Accordingly, the two defendants not parties to the contracts were dismissed when the formal judgment was entered on April 14, 1958 (Tr. 144-148) and no appeal from that dismissal has been taken.

It will thus be seen that appellee's counsel, specifically admitted that the allegations of the amended complaint with reference to concert of action were inserted for the sole purpose of attempting to hold Joint Council of Teamsters No. 28 and Western Conference of Teamsters liable along with the two local unions that executed the contracts.

The emphasis which the court's opinion places on the allegations concerning concert of action on the part of the original four defendants ceased to have any significance whatever after Western Conference of Teamsters and Joint Council of Teamsters No. 28 were dismissed.

As already stated, the case was tried on the issues made by the amended complaint and the separate answers of the defendants (appellants) in which, after admissions and denials, they affirmatively alleged that the labor contracts in question did not apply and were not intended to apply to the construction work per-

formed by the plaintiff (appellee) for the Atomic Energy Commission. The substance of this affirmative defense is correctly stated in the court's opinion, page 3. At no time after the filing of those answers and prior to the commencement of the trial on June 10, 1957, was any challenge interposed to the sufficiency of the affirmative defense so stated. At page 7 of the opinion, in a footnote, the court quotes an excerpt from a colloquy between the trial judge and counsel for the parties. At that time the trial judge inquired of defendants' counsel if they were intending to rely upon their affirmative defense as stated, and they answered in the affirmative. What relevancy that exchange between court and counsel has to the issues as later presented to this court on appeal is not stated in the opinion. The inference is that the author of the opinion finds something adverse to the appellants. That inference is not justified, for when that excerpt is read in context it is capable of no such construction.

As already stated, when the case was called for trial on June 10, 1957, for the sole purpose of trying out the liability issue, counsel for the Teamsters interposed a challenge to jurisdiction on behalf of Joint Council of Teamsters No. 28 and Western Conference of Teamsters. Counsel for the plaintiff (appellee) then made an oral motion to strike the affirmative defense stated in the answers of the Teamsters and Operating Engineers to the amended complaint. An extended discussion then took place between the trial judge and counsel for all parties (Tr. 182-192). That discussion is somewhat confusing to one not intimately familiar with

the record because counsel for the plaintiff (appellee) did not separately argue the motion to dismiss Joint Council of Teamsters No. 28 and Western Conference of Teamsters and his own motion to strike the affirmative defense stated in the answers. However that may be, during that discussion he not only admitted but emphasized that

> "the suit is based upon contract, upon two contracts (describing them) . . . and the suit, as I say, is upon that contract." (Tr. 183-184)

After that statement the excerpt quoted in the footnote then appeared (Tr. 184). Counsel for the plaintiff (appellee) then continued his argument, during which he stated, as was the fact, that somewhat similar language appeared in an answer to the original complaint but the pleadings then before the court had been changed to some extent (Tr. 185). It further appears from statements then made by both counsel and by the trial judge that when a motion against the affirmative defense as stated in the original answer was argued it was *not granted* because at that time the trial judge was of the view that:

> "I think, of course, where there is a contract before the Court, particularly one which involves engineering or technical subjects and technical language, that it is advantageous for the Court perhaps to, in understanding background, understanding the subjects to which it is to apply, to understand the terms perhaps in some instances, that the Court may hear evidence of the negotiations leading up to the contract, the making of the contract in order to put the Court, as the Supreme Court of

> the State of Washington said, in the same position of the parties, . . .'' (Tr. 188)

Thus, at the commencement of the liability hearing, defendants' counsel were confronted again with a challenge to the sufficiency of their affirmative defense which previously had been overruled. There was no reason why they should have anticipated at the beginning of the trial that they would be confronted with a contrary ruling. We, of course, do not wish to be understood as suggesting that a trial judge or, indeed, an appellate judge has no right to change his mind. On the contrary, the purpose of this petition is to convince your Honors that upon a more careful analysis of this record you ought to change your minds. The only significance of the excerpt quoted in the footnote on page 7 of the opinion is that the defendants' counsel did not abandon their affirmative defense then or later. The fact is that as the trial proceeded the defendants made a trial amendment supplemental of the defense as originally stated, which was allowed by the trial judge (Tr. 446-447, Opening Brief pp. 10-11). Of that amendment this court takes no notice whatever.

Before noticing the several assignments of error argued in the briefs and discussed in the court's opinion, we trust it will not be considered inappropriate or disrespectful to remind the court of a few elementary legal principles of contract law. When "A" sues "B" for breach of contract, to prevail "A" (in the absence of admissions by "B") must prove all of the elements of a complete case, namely:

(1) The execution or consummation of an agree-

ment between "A" and "B" applicable to the particular subject matter,

(2) that "B" by some material act or omission violated the agreement,

(3) that "A" has been damaged in some amount, and

(4) the amount of that damage computed according to established principles of contract law.

It is not sufficient that "A"' prove, one, or two, or three of these elements. His case must fail if proof of any one of these four essentials is lacking. To surmount a difficulty foreseen or unforeseen "A" is not privileged to substitute some amalgam of substantive contract law and substantive tort law blended in such proportions as may be thought necessary or convenient in that particular case.

These indisputable principles of the law of contracts should be kept in mind throughout a consideration of the case, and especially so in connection with the specification of error relating to the erroneous joint and several judgment.

APPELLANTS' SPECIFICATION OF ERROR I RE STATUS OF THE HANFORD ATOMIC ENERGY PROJECT UNDER THE U. S. CONSTITUTION

In our opening brief, pages 20-26, we cited ten decisions of the Supreme Court of the United States in support of this assignment, two earlier decisions of this court, one decision from the Supreme Court of Washington, one decision from the Supreme Court of New Mexico and one decision from the Supreme Court

of Maryland. In its decision in this case this court (pages 5-6) attempts to dispose of all these authorities in one fell swoop by stating:

> "The cases relied upon by appellant all deal with conflicts in the exercise of jurisdiction between the states and federal government. . . . These cases are not in point in determining the rights of the parties in the instant case. We are not here concerned with a conflict of jurisdiction between the state and federal government arising out of activities in the Hanford Area. We are here concerned with the question of what these parties intended when they contracted to do certain work in certain enumerated counties."

Later, in discussing specification of error II, we will comment upon the final sentence of that quoted excerpt. That statement can only mean that Article I, Section 8, Clause 17 can never have application to any case unless that case involves a direct clash of jurisdiction between a state government and the federal government. The decisions so declared to be not in point are not capable of any such construction. Moreover, not a single decision cited by the appellee, or by the court, even remotely sustains the court's quoted statement as a review of the decisions cited in our opening brief will demonstrate.

Fort Leavenworth Railroad Company v. Lowe, 114 U.S. 525, 29 L.ed. 264, arose out of a dispute between a private corporation and a sheriff of Leavenworth County, Kansas, and concerned the liability of the railroad company to pay certain taxes levied under the claimed authority of the state. The Federal government

was not a party to the case and had not the slightest concern whether that railroad company was or was not liable for the payment of those taxes.

A companion case, decided on the same day as the *Fort Leavenworth* case (May 4, 1885), and not cited in our opening brief, is *Chicago, Rock Island and Pacific Railroad Company v. McGlinn,* 114 U.S. 542, 29 L.ed. 270. That was an action brought by the owner of a cow, alleged to be of a value of $25.00, killed after it had strayed on to the railroad right of way within the limits of the Fort Leavenworth Military Reservation. Neither the State of Kansas nor the Federal government had the slightest interest in that cow.

Western Union Telegraph Company v. Chiles, 214 U.S. 274, 53 L.ed. 994, arose out of the claimed contractual liability of the telegraph company to deliver a telegram within the limits of the Norfolk Navy Yard. Neither the State of Virginia nor the Federal government had any interest whatever in the case.

Arlington Hotel Company v. Fant, 278 U.S. 439, 73 L.ed. 447, was an action by several individuals against the operator of a hotel located within the limits of the Hot Springs National Park to recover the value of certain personal property destroyed by fire. Neither the State of Arkansas nor the Federal government had the slightest interest in the destroyed property.

United States v. Unzeuta, 281 U.S. 138, 74 L.ed. 761, was a criminal case. The question was whether the District Court of the United States for the District of Nebraska did or did not have jurisdiction to try one in-

dicted for a murder committed on a railroad right of way within the limits of the Fort Robinson Military Reservation in Nebraska. The District Court sustained a plea to the jurisdiction, which was reversed. The State of Nebraska was not concerned whether the indicted party was or was not convicted in the Federal court.

An earlier case to the same effect (not cited in appellants' opening brief) is *Benson v. United States,* 146 U.S. 325, 36 L.ed. 991. This case is the same as the *Unzeuta* case, except that the murder occurred on a military reservation in Kansas instead of one in Nebraska.

Surplus Trading Company v. Cook, 281 U.S. 647, 74 L.ed. 1091, was an action between the Trading Company and a sheriff of Pulaski County, Arkansas, and concerned the liability of the Trading Company to pay taxes on certain personal property. The Federal government had no interest whatever in the question whether or not the Trading Company was liable for taxes in controversy.

Standard Oil Company of California v. California, 291 U.S. 242, 78 L.ed. 775, arose between a private corporation and the taxing authorities of California respecting its obligation to pay certain taxes on gasoline delivered within the limits of the San Francisco Presidio. The Supreme Court of California held the oil company liable. The Supreme Court of the United States gave that decision short shrift and promptly reversed it in a decision by Mr. Justice McReynolds. As appears from that opinion, when the case was in the

Supreme Court of California, counsel for the oil company contended that the San Francisco Presidio where the sale was consummated was no more within the jurisdiction of California than if that sale had been consummated in Nevada or Oregon. The California court rejected that contention, but that is exactly what the United States Supreme Court held in reversing the California court. So, in this present case, the Hanford Area is no more a part of Benton County than if, instead of being located in part within the exterior limits of Benton County, it were within the exterior limits of Nevada or Oregon.

The *San Francisco Presidio* case was decided on February 5, 1934. On that same day the United States Supreme Court decided *Murray v. Joe Gerrick & Company,* 291 U.S. 315, 78 L.ed. 821, affirming the Supreme Court of Washington in holding that the Puget Sound Navy Yard at Bremerton is not a part of Kitsap County, Washington. That was an action by the widow of a workman accidentally killed while working for an independent contractor within the limits of the navy yard. The action was against the employer for negligence. Neither the State of Washington nor the Federal government had any interest in the outcome of that litigation.

In *Pacific Coast Dairy v. Department of Agriculture,* 318 U.S. 285, 87 L.ed. 761, the Supreme Court of the United States again reversed the Supreme Court of California, as it had previously done in the *San Francisco Presidio* case, and held that Moffet Air Field in Santa Clara County, California, is not part of that

state. The litigation arose between a private corporation and the California Department of Agriculture. The Federal government was not a party to the case and had no direct interest in the outcome.

Johnson v. Yellow Cab Transit Company, 321 U.S. 383, 88 L.ed. 814, involved a controversy between a private corporation engaged in delivering intoxicating liquor to an officers' club, maintained at the Fort Sill Military Reservation in Oklahoma, and certain officers concerned with the enforcement of Oklahoma's liquor laws. The Federal government was not a party to the case and had no interest in it, unless it can be assumed that indirectly the Federal government might be concerned because of the possibility that some of its army officers might be deprived of a dependable supply of liquor.

Murphy v. Love, 249 F.(2d) 783. As stated on page 22 of our opening brief, the Court of Appeals of the Tenth Circuit made the same decision as to the Fort Leavenworth Military Reservation in Kansas as the United States Supreme Court had made as to Fort Sill in Oklahoma.

In our opening brief, page 25, we cited *Collins v. Yosemite Park & Curry Co.,* 304 U.S. 518, 82 L.ed. 1502. The Yosemite Park Company (appellee in the case), a private corporation, had a contract with the Secretary of Interior to operate hotels, camps and stores in the Yosemite National Park. Its contract entitled it to sell liquors, beer and wine to park visitors for prices approved by the Secretary of Interior. In

the ordinary course of its business it imported from places outside of California beer, wine and distilled spirits which it stored and sold within the park. Certain officers of the state, whose duty it was to enforce the provisions of the state "Alcoholic Beverage Control Act," threatened to interfere with the activities of that concessionaire. It brought a suit for an injunction in the United States District Court for the Northern District of California to enjoin the threatened interference. The case was heard before a panel consisting of one Circuit Judge and two District Judges who issued the injunction sought by the Park Company. A direct appeal was taken to the Supreme Court of the United States. In our opening brief, page 26, we quoted the syllabus of that decision as it appears in 82 L.ed., page 1502. We now quote the pertinent portions of that opinion as they appear in the opinion itself:

> "The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arrangement. *These arrangements the courts will recognize and respect.*
>
> "The State urges the constitutional inability of the National Government to accept exclusive jurisdiction of any land for purposes other than those specified in Clause 17, § 8, Article I of the Constitution. *This clause has not been strictly construed. This Court at this term has given full con-*

> *sideration to the constitutional power of the United States to acquire land under Clause 17 without taking exclusive jurisdiction.* In that case, it was said: 'Clause 17 contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the State and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation.'' (304 U.S., pages 528-529—emphasis supplied)

Again, the court said, at page 530:

> ''. . . the respective sovereignties should be in a position to adjust their jurisdictions. There is no constitutional objection to such an adjustment of rights. It follows that jurisdiction less than exclusive may be granted the United States.''

The District Court granted an injunction broadly prohibiting the state officers from interfering in any manner at all with the activities of the Park Company. But it appeared that the state in consenting to the acquisition by the Federal government had expressly retained the right to levy certain excise taxes. On appeal, the Supreme Court held that the injunction as issued by the District Court was too broad holding that, though the state had a right to collect the excise taxes, it had no right to enforce the other regulatory provisions of the Alcoholic Beverage Control Act. In concluding its opinion, the Supreme Court said:

> ''. . . As in our judgment, as heretofore pointed out, the tax provisions are enforceable and the

> regulatory provisions unenforceable, it is necessary to reverse the decree and remand the cause to the District Court for a determination by the Court in accordance with this opinion of the applicability of such sections of the Act as the State may threaten to enforce." (304 U.S. 539, 82 L.ed. 515)

The appellee in its brief, page 15, cites and quotes this decision under the obvious misapprehension that in some way it favors its contention that there can never be a Federal enclave within the meaning of Article I, Section 8, Clause 17, unless the Federal jurisdiction is completely exclusive. That is exactly what the decision does not hold. That decision cited by both the appellants and by the appellee favors one side or the other. If it does not support the contention of the appellee, then it does support the contention of the appellants. Yet the opinion of this court passes it by in complete silence.

In support of the statement at page 5 of the opinion that Article I, Section 8, Clause 17 of the U.S. Constitution can have no application except in cases dealing "with conflicts in the exercise of jurisdiction between the states and the Federal government," the opinion cites the *San Francisco Presidio* case, 291 U.S. 242, 78 L.de. 775, and the *Moffet Air Field* case, 318 U.S. 285, 87 L.ed. 761. The only ground upon which these cases can conceivably seem to support the court's statement is that in some degree the imposition of excise taxes in the *Presidio* case and the regulations of the state in the *Moffet Field* case might indirectly and remotely tend to

increase the price of oil and dairly products required by agencies of the Federal government. The opinion does not so state, but that is the only possible inference. If that is what the court meant to infer, it is wholly inadmissible when the *Presidio* case, 291 U.S. 242, 78 L.ed. 775, is considered in the light of the *Bremerton Navy Yard case,* 291 U.S. 315, 78 L.ed. 821. Both the *Presidio* case and the *Bremerton Navy Yard* case were unanimous decisions of the United States Supreme Court as then constituted. Both were decided on the same day (February 5, ~~1951~~ 1931). The opinion in the *Presidio* case was written by Mr. Justice McReynolds, and Mr. Justice Roberts concurred. The opinion in the *Bremerton Navy Yard* case was written by Mr. Justice Roberts, and Mr. Justice McReynolds concurred. In addition to those two justices, the court as then constituted consisted of Chief Justice Hughes and Associate Justices Van Devanter, Brandeis, Sutherland, Butler, Stone and Cardozo. If one of those cases was distinguishable from the other for the reason implied in the decision of this court, it is inconceivable that none of the other seven members of the court could possibly have overlooked such an important distinction involving the construction of an important provision of the Federal Constitution.

Having reviewed the cited decisions of the Supreme Court of the United States, it is unnecessary, we think, to further analyze the two earlier decisions of this court cited in our opening brief at page 22, except to point out that in discussing *Yellowstone Park Transportation Company v. Gallatin County,* 31 F.(2d) 645, we

said that it had to do with the taxation of *lands* in Yellowstone Park. That statement is incorrect. It concerned the attempted taxation of certain *personal property* operated by the Yellowstone Park Transportation Company, a private corporation. Neither is it necessary to further notice at length the three decisions of state courts, one by the Supreme Court of Washington, one by the Supreme Court of New Mexico, and one by the Supreme Court of Maryland, cited in our opening brief at pages 22-25.

Suffice it to say that they are in complete harmony with the decisions of the Supreme Court of the United States and are wholly inconsistent with the opinion in this case.

When the cited decisions of the Supreme Court of the United States are analyzed it must be clear that they do not support the declaration that Article I, Section 8, Clause 17 of the United States Constitution applies only in cases dealing "with conflicts in the exercise of jurisdiction between the states and the Federal government." True, that clause may become involved in cases in that category, but it is also equally applicable in cases in which neither a state nor the Federal government has any interest at all. For instance, it was involved in the case concerning the killing of the cow on the Fort Leavenworth Reservation (114 U.S. 542, 29 L.ed. 270). It was involved in the case concerning the contractual liability of the telegraph company to deliver a message within the limits of the Norfolk Navy Yard (214 U.S. 274, 53 L.ed. 994). It was involved in

the case concerning the loss by fire of the personal property of the guest in a hotel located within the limits of the Hot Springs National Park (278 U.S. 439, 73 L.ed. 447). It was involved in the case concerning the action for damage by the widow whose husband was accidentally killed while working for an independent contractor within the limts of the Bremerton Navy Yard (291 U.S. 315, 78 L.ed. 821). The New Mexico case, *Arledge v. Mabry,* 52 N.M. 303, 197 P.(2d) 884, related to the Los Alamos Project in Sandoval County, and the right to vote in New Mexico. *Lowe v. Lowe,* 150 Md. 592, 133 Atl. 729, concerned the Maryland divorce statute. It cannot be supposed that the Federal government had the slightest interest whether the complaining husband or the cross-complaining wife did or did not secure a divorce.

After first arguing that the Hanford area could not exist as a federal enclave because the federal jurisdiction is not completely exclusive, the appellee relies upon an alternative founded upon the letter of November 8, 1943, from the Secretary of War to the Governor of the State of Washington included in Exhibit 20 and also printed in the Transcript at page 73. That is one of five letters constituting the exhibit. On May 26, 1943, after the United States by condemnation had first acquired lands in Benton County and adjoining counties for incorporation in the Hanford project, the Secretary of War wrote a letter to the Governor of Washington accepting jurisdiction. Later, the Secretary of War wrote the letter of November 8, 1943, stating that:

> "The War Department does not desire to exercise concurrent jurisdiction over this reservation, but prefers that it remain under the jurisdiction of the State of Washington."

The later letters in Exhibit 20 are to the same effect and presumably were written because in the meantime the additional lands had been acquired.

In the first place, having once accepted jurisdiction by the letter of May 26, 1943, it is at least doubtful if the Secretary of War had any authority from Congress to revoke that acceptance by the letter of November 8, 1943, but there is no need to stress that point because the only authority the Secretary of War had to write this letter of November 8, 1943, was that conferred by the act of Congress of October 9, 1940 (40 U.S.C.A., Section 255).

In the leading case of *Fort Leavenworth Railroad Company v. Lowe,* 114 U.S. 525, 29 L.ed. 264, decided in ~~1855~~, the court discussed generally the constitutional provision relative to the acquisitions of lands for military establishments, which are to be made *"by session of particular states, and acceptance by Congress."* Until the passage of the act of October 9, 1940 (40 U.S.C.A., Section 255) there was no provision of law authorizing any administrative officer to accept or refuse acceptance of jurisdiction. Until then Congress itself had to act. Accordingly, the act of 1940 was passed defining the authority of heads of departments and independent establishments or agencies of the government. The letter of November 8, 1943, must be read in the light of

that statute, pertinent provisions of which are quoted in appellee's brief, pages 5-6, and read:

> "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; * * * "

Here follows the provisions authorizing acceptance by heads of departments, etc. The act then continues:

> "*Unless and until* the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

After quoting from the letter of November 8, 1943 (Opinion, page 4) and an excerpt from the President's Executive Order No. 9816 (Opinion, page 6), the opinion proceeds to dispose of the question by this novel statement:

> "This did not result in there being transferred to the Atomic Energy Commission anything more than the United States had at that time. If the United States did not at the time of the passage of this Act have exclusive jurisdiction over the Hanford Works Area, and we hold that it did not, it could not transfer to the Atomic Energy Commission something which it did not have."

The court speaks as if the transfer from the War Department to the Atomic Energy Commission on December 31, 1946, was a conveyance in the nature of a quitclaim deed from the War Department, one agency of the federal government, to the Atomic Energy Com-

mission, another federal agency. If John Doe by quitclaim deed conveys a described tract of land to Richard Roe, the grantee gets a perfect title if the grantor has a perfect title. The grantee gets a defective title if the grantor has a defective title. The grantee gets no title at all if the grantor has no title. That rule of real estate law has no possible application to the transfer of the Hanford area to the Atomic Energy Commission by the President's Executive Order of December 31, ~~1956~~. The 19 quoted statement from the opinion is equivalent to saying that when the Secretary of War wrote the letter of November 8, 1943, he irrevocably abrogated in perpetuity the constitutional powers of both Congress and the President as President and Commander-in-Chief of the Army and Navy from ever thereafter accepting jurisdiction, exclusive, concurrent or partial. The statute is capable of no such construction and, if it be so construed, a serious question of its constitutionalty would emerge, because Congress is without power to abdicate its functions and make a wholesale delegation of its constitutional powers to any administrative officer, however exalted he may be. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 81 L.ed. 893, Chief Justice Hughes, speaking for the United States Supreme Court, said:

> "We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same." (301 U.S. p. 30, 81 L.ed. p. 908)

The Supreme Court of the United States considered the act of October 9, 1940 (40 U.S.C.A., Section 255) in *Adams v. United States,* 319 U.S. 312, 87 L.ed. 1421. Three soldiers stationed in a military camp in Louisiana had committed a serious crime and were convicted in the United States District Court for the Western District of Louisiana. Formal acceptance of jurisdiction had not been made as prescribed by the act of October 9, 1940. On appeal from that conviction, the Department of Justice confessed error and the case was reversed for want of jurisdiction. In stating why the act of October 9, 1940, was passed, the court in a footnote quotes from the congressional history of the bill as follows:

> "In the words of a sponsor of the bill, the object of the act was flexibility, so 'that the Government *could at any time* designate what type of jurisdiction is necessary; * * * "

The Secretary of War in writing the letter was but an agent of the federal government with the limited authority defined in the statute. We venture to think that it is a rather startling proposition of federal constitutional law to say that Congress after that letter was written by the Secretary of War could never thereafter exercise its constitutional powers, either directly or by direction to the President who, of course, is the superior of the Secretary of War, both as President and as Commander-in-Chief of the Army and Navy.

For reasons stated in our reply brief, pages 3-9, the passage of the Atomic Energy Act of 1946, together with the Executive Order No. 9816 promulgated on

December 31, 1946, by the President as directed by that Act, was a direct and unequivocal acceptance of jurisdiction by Congress itself. In the opinion, no notice is taken of the authorities cited on page 9 of our reply brief which clearly sustain that contention.

The statute by authority of which the letter of November 8, 1943, was written plainly says that such a letter does nothing more than create a *presumption of non-acceptance,* which presumption continues to exist only *until* the United States does accept. A presumption by its very nature is a temporary expedient. As the Supreme Court of Washington has well expressed it in *Beeman v. Puget Sound Traction L. & P. Co.,* 79 Wash. 137, at page 139:

> "They (presumptions) are never allowed to displace facts."

and, quoting from a cited case, it said:

> "Presumptions as happily stated by a scholarly counselor *ore tenus,* in another case, may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts."

Before the quoted excerpt appearing on page 6 of the opinion irrevocably becomes a final pronouncement of this court, we respectfully suggest that it should receive the consideration of the court *en banc* and the concurrence of at least a majority of the active judges.

Appellants' Specifications of Error II and VI Concerning Meaning of Benton County as Used in the Labor Contracts

These specifications are discussed in our opening brief, pages 33-42, in appellee's brief, pages 17-29, and in our reply brief, pages 13-19. The question is, what did the parties mean by the term "Benton County" when the two labor contracts (Exhibits 2 and 3) were negotiated in November and December, 1955, nearly 13 years after the Federal government first acquired lands in Benton and surrounding counties for national defense uses and 9 years after Congress and the President, by direct action, transferred the Hanford area from the War Department to the newly-created Atomic Energy Commission, conferring on that new agency full jurisdiction consistent with the constitution and laws of the state of Washington. The appellee maintains that the term "Benton County," as so used, of necessity means that county as it existed territorially prior to February, 1943. The appellants insist that the term "Benton County" means that county as it existed when the contracts were being negotiated in November and December, 1955. By its opinion, the court has sustained the appellee's view. The appellee in its brief, as said in our reply brief, at page 2, has largely confused these Specifications II and VI with its discussion of Specification I. To an extent, the court has done likewise. If, as the appellee has contended and the court has held, the term "Benton County" as a matter of law must be read as meaning that county as it existed at the earlier date and cannot by any possibility mean

that county as it existed at the time the contracts were executed in 1955, then the discussion in the opinion concerning Specifications II and VI is wholly irrelevant. Yet, the court, doubtful of the validity of its decision as to Specification I, proceeds to rely upon extrinsic facts said to support the view that when negotiating the contracts in November and December, 1955, the parties intended "Benton County" to mean that county as it existed territorially at the earlier date. On page 6 of its opinion it is said that:

> "We are here concerned with the question of what these parties intended when they contracted to do certain work in certain enumerated counties. One of the counties enumerated is Benton County."

A large part of appellee's brief directed to these two specifications is devoted to the citation and discussion of numerous decisions stating the elementary rule that extrinsic evidence will not be received to modify or explain the language of a written contract when the contract is unambiguous and not capable of more than one meaning. We, of course, do not dispute that rule, and so stated specifically on pages 12-13 of our reply brief. The question here is not the existence of the parol evidence rule, but rather its application to undisputed facts. The court, in its opinion, cites one Washington case (*Schwieger v. Robbins & Co.,* 48 Wn.(2d) 22) in which the Supreme Court of Washington stated (quoting from the syllabus) that:

> "The court will not interpret the meaning of unambiguous contracts. . . . The court will not permit

> oral evidence to establish or create an ambiguity in a written contract."

That is but a concise statement of hornbook law that we would not be so brash as to question. The question here is, does the term "Benton County" mean that county as it existed when the contracts were negotiated or does it mean that county as it existed territorially some thirteen years earlier. The court, in its opinion, makes no mention at all of any of the authorities we cited in support of our view (see opening brief, page 35, and Appendix III opening brief, pages 97-99). To bolster its decision, in overruling our Specification of Error I, the court itself resorts to extrinsic facts when, in the paragraph of the opinion at pages 6-7, it says:

> "There was also testimony before the trial court that all the criminal laws of the state of Washington were enforced within the Hanford Works Area by the sheriffs of the various counties, that within the Area there is a Justice of the Peace who has an office and holds court within the Area under the appointment of the county supervisors. The schools within the Area are under the Washington State Department of Education the same as other school districts within the state and receive their per capita from the state. A witness connected with the Atomic Energy Commission testified that he was a resident of the Hanford Works Area and that he voted in state elections as a resident of the State of Washington."

First, as to the enforcement of certain Washington criminal laws by the sheriffs of the various counties: As shown in our reply brief, page 10, an act of Congress

known as the Assimilated Crimes Act of 1948 (18 U.S. C.A., Section 13) specifically provides for the enforcement of certain criminal laws of the state within the limits of a Federal enclave. Moreover, the appellee's witness (Mr. Bacon) who testified on that subject said that, while the law enforcement officers were deputized by the county sheriff (Tr. 762), the guards and police within the barrier, as well as the fire department, were paid by the Atomic Energy Commission (Tr. 777-778). These facts but emphasize that the Hanford Area has been operated and treated as a Federal enclave.

Second, it is said that schools within the area are under the Washington State Department of Education, the same as other schools within the state, etc. That statement is in direct conflict with the evidence introduced by the appellee itself, namely, Exhibits 17 and 18, referred to in our opening brief, pages 31-32. Those exhibits are contracts between Atomic Energy Commission and Richland School District 400, which were entered into under authority of the Atomic Energy Act itself (42 U.S.C.A., Section 2208), because and only because the Hanford Area is a Federal enclave of which that Commission has full jurisdiction consistent with the constitution and laws of the state of Washington.

Third, it is said that a witness connected with the Atomic Energy Commission (Mr. Bacon) testified that he was a resident of the Hanford Works Area and that he voted in state elections as a resident of the state of Washington. The evidence of Mr. Bacon on that subject elicited by appellee's counsel reads:

"Q. (By Mr. DeGarmo): Mr. Bacon, as a resident of Richland, Washington, do you vote?

A. Yes, sir.

Q. Has there been a time since when you took up residence at Richland when you have not been permitted to vote as a citizen of the State of Washington, to your knowledge?

A. No, sir; I don't believe I even had to wait. I had been a resident of the state before my moving there, so I had legal residence in the state." (Tr. 768)

Mr. Bacon, a qualified voter of the state of Washington, did not lose his voting rights when he became employed by the Atomic Energy Commission, for the same reason that a United States Senator from California does not lose his voting rights when he takes up his residence in Washington, D. C.

There are some other facts in the same category not mentioned in the court's opinion. A plan for compensating injured workmen and their dependants was inaugurated, but as a matter of convenience it was administered by the State Labor Department under a contract with the Atomic Energy Commission. This contract was introduced by the appellee (see opening brief, page 31). That again proves, if it proves anything, that the Hanford Area was regarded by both state authorities and Federal authorities as a characteristic Federal enclave.

In discussing this specification, the court on page 9 quotes a sentence out of context taken from a paragraph appearing on page 36 of the opening brief. One

unfamiliar with the record and unfamiliar with the briefs would be justified in concluding that we had waived the erroneous ruling of the trial court in striking our affirmative defense to the amended complaint. As quoted, that sentence reads:

> "most of the evidence which would have been admissible if the affirmative defenses had not been stricken, later came into the record * * * "

The paragraph of our brief from which the quoted sentence is taken reads:

> " * * * the striking of defendants' affirmative defenses has now ceased to be of any great materiality.
>
> "In the first place, the appellee to prevail had the burden of proving that the two contracts effective January 1, 1956, were applicable to the Hanford area. It was not relieved of that burden because the appellants affirmatively said that they were not applicable.
>
> "In the second place, as the trial court indicated at a later stage of the trial (Tr. 377-378), in view of the oral and documentary evidence, the court was no longer concerned with any technical questions of pleading, but rather with the effect to be given to the undisputed evidence.
>
> "In the third place, most of the evidence which would have been admissible, if the affirmative defenses had not been stricken, later came into the record under the trial amendment set forth at page 10.
>
> "In the fourth place, both the oral and documentary evidence introduced by the appellee itself proves conclusively that the two contracts

in question were not applicable to the Hanford area."

When, in that quoted paragraph, we said "most of the evidence" we meant exactly what we said. If we had meant all of the evidence we would have said *all* and not *most*.

If, as stated in the opinion, "we are here concerned with the question of what the parties intended when they contracted to do certain work in certain enumerated counties," nothing could be more important than the offered evidence of the appellants' witness Rossman, by whom the appellants sought to prove that on November 3, 1955, the Chairman of the Contractors' Negotiating Committee stated specifically that they were not negotiating at all with the Hanford area in mind (see reply brief, pages 17-18).

In the affirmative defense pleaded in appellants' answers to the amended complaint, those being the answers upon which the case was tried, and the only answers before this court, the appellants did not claim that the Federal jurisdiction of the Hanford Area was completely exclusive for the all-sufficient reason that it was entirely unnecessary to make any such claim. The statute heretofore discussed (40 U.S.C.A., Section 255) which, as we have said, was the sole authority for the Secretary of War, writing the letter of November 8, 1943, specifically recognizes that there may be a Federal enclave within the meaning of Article I, Section 8, Clause 17 of the Federal constitution without the Federal jurisdiction being exclusive. That juris-

diction may be exclusive, or partial, or in some respects concurrent, as that statute and the decision of the Supreme Court of the United States in the *Yosemite Park* case (*Collins v. Yosemite Park and Curry Co.,* 304 U.S. 518, 82 L.ed. 1508) states too plainly for any misunderstanding.

The discussion of these two Specifications of Error might be continued on and on, but it will have to be ended sometime so we will stop now, and proceed to the consideration of other specifications.

Appellants' Specification of Error III-A

This specification is discussed in our opening brief, pages 43-46, in appellee's brief, pages 29-35, and in the reply brief, pages 19-20. It raises the question whether the appellee can maintain a suit on the labor contracts (Exhibits 2 and 3), neither of which it had signed. We cited *Ketcher v. Sheet Metal Workers,* 115 F.Supp. 802, a decision of the United States District Court for the Eastern District of Arkansas. The appellee cited *Farina Bros. Co. v. United Brotherhood of Carpenters,* 152 F.Supp. 423, a decision of the United States District Court for the Massachusetts District, which is directly to the contrary. We concede the right of this court to prefer the *Farina* decision to the *Ketcher* decision, until the court of last resort has spoken on the precise point.

Appellants' Specification of Error III-B Concerning Appellee's Commitment at the Pre-Job Conference of January 5, 1956, to Continue Existing Working Conditions Under Hanford Works Agreement

This specification of error is discussed in our opening brief, pages 46-51, in appellee's brief, pages 35-43, and in the reply brief, pages 20-24. In Appendix IV to our opening brief we set out in detail the uncontradicted evidence of all the witnesses, including the express admission by the appellee's Director of Labor Relations that at that pre-job meeting he did make the unqualified commitment attributed to him by appellants' witnesses. Appellee's counsel among other things claimed (appellee's brief, page 43) "that no such defense was pleaded," in spite of the fact that the trial amendment allowed during the trial, and quoted at length in our opening brief, was sufficiently broad to justify the trial judge in admitting the evidence as the trial judge did. However that may be, Rule 15 of Rules of Civil Procedure specifically provides that the pleadings shall be deemed amended to conform to the evidence; that failure to amend does not affect the result of the trial; and that the court may grant a continuance to enable an objecting party to meet evidence not within the pleadings as strictly construed. Appellee made no request for continuance for the obvious reason that such a request would have been frivolous because the evidence came from the mouth of its own witness.

In its opinion at page 4, the court in dealing with this specification states:

> "Under specification 3(b) appellants contend that the appellee precipitated the work stoppage. Suffice it to say that upon this point the trial court made a finding adverse to the appellants upon the basis of all of the evidence. We hold there is ample evidence to support this finding."

The record does not support that statement. The trial court could not have made an adverse finding of fact on disputed evidence because there was no disputed evidence. The fact is the trial court made no finding of fact at all, and we say that advisedly. What was said in the findings of fact proposed by the appellee and adopted by the trial judge appears in the Transcript, Volume 1, page 136, where it is recited:

> " * * * that any statement or statements claimed by witnesses for the Defendants to have been made by Lee E. Knack, Manager of Labor Relations for Plaintiff, at a meeting held in Pasco, Washington, on January 5, 1956, were not made as a contractual commitment on behalf of Plaintiff * * * "

That so-called finding to the extent that it is a finding of fact actually is an admission by the appellee and a finding by the trial judge that the commitment was made but the appellee would avoid its legal effect by stating that it was "not made as a contractual commitment." Whether a certain set of undisputed facts does or does not amount to a "contractual commitment" is a conclusion of law even though incorporated in a document entitled "Findings of Fact." The effort of the appellee to make it appear that the appellee's admitted pre-job commitment was nothing more than some idle

chatter should not be accepted as valid. To convert an unsupported conclusion of law into a valid adverse finding of fact exactly matches the observation of Mr. Justice Frankfurter in *Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 85 L.ed. 836, p. 841, where he aptly observed that it is of prime importance that important rights should not be defeated "by insubstantial findings of fact screening reality."

On the oral argument appellee's counsel attempted to make it appear that the appellants admitted that the commitment to continue isolation pay and furnish bus transportation was not binding on the appellee because, as stated on page 47 of our brief, we said that we did not claim that Doctor McCaffree did have authority to speak for and bind the appellee. When quoting that sentence out of context, he failed to supplement it by what we did say at page 50, that:

> "The appellants do not claim that the commitment became binding on appellee because originally made by Doctor McCaffree on Decmeber 29, 1955. It became binding upon the appellee because with full knowledge of it and the conditions resulting from it Mr. Knack, who did have authority, adopted it, ratified it and on January 5, 1956, made it his own."

Appellants' Specification of Error III-C Concerning the Appellee's Violation of the Provisions of the Contracts Prohibiting Strikes and Lockouts

This specification is discussed in the opening brief, pages 57-60, in the appellee's brief, pages 43-50, and in

our reply brief, pages 27-30. It relates to the sections of the contracts providing that there shall be no strikes or lockouts and providing that any disputes that may arise shall be settled by arbitration. These provisions are quoted in the opening brief, pages 57-58, and are equally binding both on the employer and the local union executing the contract. Each contract specifically provides that if a dispute arises, written notice of the same shall be promptly (in no event later than ten (10) days) given by the offended party (either employer or the union) to the other. It further provides that if the two parties are unable to adjust their differences within forty-eight (48) hours, the dispute shall be settled by arbitration and then provides in detail how the arbitrators are to be selected.

The evidence is undisputed that the work stoppage occurred on March 23, 1956, when the workmen reported for work and found no buses available to take them to their places of employment. The job was not picketed until April 5, 1956, two weeks later. There is no pretense that the appellee within that period of fourteen days, and much less within the maximum period of ten days stipulated in the contracts, gave any written notice of a demand for abritration so that the unions could comply with the arbitration provisions of the contracts.

In disposing of this specification the court in its opinion at page 10 says:

> "Appellant(s) made no pleadings in the trial court tendering this issue, nor did they propose

any findings of fact or conclusions of law in support thereof."

That statement is but a repetition of the answer the appellee attempted to make to that specification and is completely answered in our reply brief, pages 27-30. The effect of the court's opinion is to say that there was no obligation at all on the appellee, after it had caused the work stoppage on March 23, 1956, to comply with the arbitration provisions of the contracts because conceivably if it had given the written notice within the limited time stipulated, its demand might not have produced results. That, we submit, is no answer at all. Further in this connection as pointed out in our opening brief, pages 59-60, what appellee was attempting to do, from March 16, 1956, until the work stoppage on March 23, 1956, according to evidence of its own witness, Mr. Sam C. Guess, was to prevail upon the unions to agree to mediate an amendment proposed by the contractors for the specific purpose of making the contracts applicable to the Hanford area.

If the two labor contracts as written and in effect since January 1, 1956, did apply to the Hanford area, then the appellee itself in the first instance indisputably failed to comply with the arbitration provisions which it now claims were violated by the appellants. It will not do for the court to say, as in effect it has said, that the unions were bound to comply literally with the arbitration provisions of the contracts but that the appellee at its election was privileged to ignore them.

Appellants' Specification of Error IV re Joint and Several Liability

This specification is discussed in our opening brief, pages 51-57, in the appellee's brief, pages 51-55, and in the reply brief, pages 24-27. The joint and several judgment with interest and costs now amounts to approximately $160,000. We do not mean to suggest that, because the judgment is large, that alone is a controlling reason why a rehearing should be granted, but we think it is a factor entitled to some consideration. In considering this specification, it is especially important that the court bear in mind what has already been said on the preceding pages 11-12, that having elected to sue for breach of contract under Section 301 of the Labor Relations Act of 1947, the appellee had the burden throughout to prove all the indispensable elements of a contract cause of action. To surmount some difficulty, foreseen or unforeseen, it was not privileged to substitute some blend of substantive contract law and substantive tort law as might be found convenient.

The court attempts to dispose of this specification by the discussion appearing at pages 12-13 of the opinion. In stating some of the facts which it conceived as authorizing the joint and several judgment, the court at page 11 makes one serious mis-statement of the record, no doubt misled by a statement appearing in appellee's brief at page 52 where it is said:

> "The establishment of pickets on April 5, 1956, was jointly by the Teamsters, Operating Engineers and Cement Finishers." (Tr. 410)

The court accepts this as a correct statement by saying at page 12:

> " * * * and they (the two local unions) each participated in the work stoppage on March 23. Thereafter, each appellant union established pickets on April 5, 1956."

The record supports neither the statement in appellee's brief nor that made by the court. The only witness who testified concerning picketing was Ramon E. Reed, the Project Manager. Mr. Reed testified (Tr. 409-410) that there were no pickets on the job on either March 22 or March 23, 1956. A picket first appeared on April 5, 1956, when Mr. Reed saw one picket at the bridge at the Richland entrance. That picket was leaning against a car. There was a sign saying that the Hanford contractors were unfair and it mentioned three unions, namely, Teamsters, Operating Engineers and Cement Finishers. That is the evidence and the only evidence relative to picketing. That one picket was not identified by Mr. Reed nor by anyone else as either a Teamsters' picket or an Operating Engineers' picket. He may have been a picket placed there by the Cement Finishers or, indeed, by any other of the dozen or more unions affiliated with the Pasco-Kennewick Building Trades Council whose members had been deprived of transportation by the elimination of buses two weeks earlier.

The statement that "each participated in the work stoppage on March 23, 1956," is without any support in the record. The cessation of work from March 22 or March 23, whichever is the correct date, to April 5,

1956, when the job was picketed by somebody not identified, was caused solely by the refusal of the appellee to furnish the bus transportation that it had been furnishing since the job was started on November 28, 1955, and which its Director of Labor Relations had promised to continue.

When the case was heard in this court on May 13, 1959, the argument on behalf of both appellants was made by counsel who had represented Operating Engineers Union 370 at the trial. This procedure was adopted because in a case involving numerous questions of law and fact it is a waste of time for several counsel on the same side to divide forty-five minutes.

During appellants' opening argument, one member of the court (Judge Barnes) repeatedly asked the appellants' counsel, "How are you hurt?" The question as put by His Honor could only mean how have the appellant unions been hurt by the joint and several judgment, conceding it to be erroneous for jurisdictional or other reasons. That question for the first time implied a possible justification not remotely suggested in appellee's brief. The answer to that question is clear. If Section 301 of the Labor Management Relations Act of 1947 does not authorize a joint and several judgment, one union or the other or both will be seriously hurt. If John Doe secures a judgment for $160,000 against Richard Roe who is worth $160,000, and that judgment is erroneous for jurisdictional or other reasons, Richard Roe is going to be hurt to the extent of $160,000, unless the erroneous judgment is vacated on appeal.

The appellee sued the Teamsters Union for breach of contract, claiming that it had caused some damage properly chargeable against its contract. Likewise, it sued Operating Engineers Union for breach of contract, claiming that it had caused some damage properly chargeable against its contract. One union or the other may have caused all the damage. One union may have caused some of the damage and the other union may have caused the balance. If the Teamsters Union caused but half of the damage, as may have been the case, then it is going to be hurt to the extent of the excess that it may have to pay over that one-half. The same thing is true of the Operating Engineers Union. Conceivably but one-third or one-tenth of the total damage may have been caused by one union and yet by this judgment it must pay the entire 100% if the appellee elects to pursue it alone. As pointed out in our opening brief, page 57, there is no evidence in the record by which the court can now assess total damage found as between Teamsters Local 839 and the Operating Engineers Local 370 according to their respective liabilities as Rule 20-A of Rules of Civil Procedure requires. As stated in our reply brief, pages 26-27, appellee neither segregated the damages as between the two defendants nor did it prove that a segregation could not be made. In the absence of evidence, this court cannot properly hold as a matter of law that a segregation cannot be made and for that reason the appellee is entitled to a joint and several judgment.

Appellee's counsel in their brief admit that they do not and cannot question the authorities we have cited

(opening brief, pages 53-54) holding that when two defendants are liable on several and distinct contracts, there can be no joint liability. The opinion of the court does not state why those authorities are not controlling. Hence, it is unnecessary to do more now than again refer to the law as stated by Professor Williston, probably the outstanding authority on the law of contracts:

> "THE CIRCUMSTANCE THAT PROMISES ARE CONTAINED IN SEPARATE INSTRUMENTS THOUGH IN IDENTICAL TERMS SHOWS THE PROMISES TO BE SEVERAL." Williston on Contracts, Vol. 2, Sec. 323, p. 940.

The judgment as entered originally on April 14, 1958 (Tr. 144-148) is admitted to be a joint and several judgment in substance and form. If the appellee is entitled to that kind of a judgment, it is still unexplained why the amendatory order of May 8, 1958, was entered (Tr. 171-174).

In the final paragraph of the opinion it is said that the *pro tanto* provisions of the amending order of May 8, 1958, were inserted for the benefit of the appellants. What benefit does that phraseology confer? If that language were absent, could the appellee collect the judgment in full once and later again collect all of it or some part of it from one or the other of the two unions against whom the judgment runs? That language but accurately describes a joint and several judgment that the trial court was without jurisdiction to grant.

In its printed brief the appellee attempted to defend the joint and several judgment by saying that a refusal

to sustain it in that form would be "illogical." In the oral argument appellee's counsel only said that to refuse to sustain the joint and several judgment would be "inequitable." The sufficient answer to that is that we are not dealing with questions of theoretical logic or abstract questions of equity. If the appellee is not within the four corners of the jurisdictional statute that it invoked when it filed its action in the District Court, it avails it nothing to be almost on the right side of the jurisdictional fence. If it is not entirely within the limited jurisdiction granted by Section 301 of the Labor Management Relations Act, then it is simply a case of the appellee being in the wrong court with the wrong kind of a case. The appellee's plea is fully answered by the decision of the Supreme Court of the United States in *Montgomery Building & Construction Trades Council et al. v. Ledbetter Erection Company, Inc.,* 344 U.S. 178, 97 L.ed. 204, also a case arising under the Labor Relations Act. There a labor union, for supposed equitable or hardship reasons, sought to prevail upon the Supreme Court to take jurisdiction of a case not clearly within the applicable jurisdictional statute. In declining to do so, the court said:

> "However appealing such argument may be, it does not warrant us in enlarging our jurisdiction. Only Congress may do that." (344 U.S. p. 181, 97 L.ed. p. 207)

Appellants' Specification of Error V Concerning the Damage Award

This specification is discussed in the opening brief, pages 61-71, in the appellee's brief, pages 55-66, and in

our reply brief, pages 32-35. The court disposes of it by stating at page 11 of the opinion that:

> "Appellants' specifications of error 5 contends that the award of $147,284.41 as damages is excessive. A detailed statement of all of the claimed items of damage would unduly lengthen this opinion. Suffice it to say that we have examined the record and there is sufficient evidence to support each item of damage included in the total amount."

The court having failed to disclose why it thinks appellants' objections to particular items going to make up the aggregate judgment are without merit, it would serve no purpose to now repeat what has already been said in the opening and reply briefs. However, we wish to make it clear that we do not concede the correctness of the court's disposition of this specification of error and reserve the right to question it if a rehearing *en banc is* granted.

Appellee's counsel in their printed brief made no serious attempt to answer the arguments we submitted in support of some of our several specifications of error but stated at pages 2-3 of their brief that they would rely upon the court's own study of the record and their later oral argument. Not being mind readers, we could not anticipate what would be said on the oral arguments and not disclosed in appellee's printed brief. Hence, in our reply brief we suggested (pages 30-31) that on the argument appellee's counsel, without equivocation or evasion, answer six questions which we there clearly stated.

1. We asked that they state whether or not it was their

claim that a federal enclave within the meaning of Article I, Section 8, Clause 17 of the U.S. Constitution cannot exist unless the federal jurisdiction is completely exclusive. On the oral argument no answer was made to that question but the opinion of the court is to the effect that the federal jurisdiction must be exclusive, else a federal enclave cannot exist. We think that that answer is clearly erroneous.

2. We suggested that appellee's counsel on the oral argument state what significance, if any, they accorded to the President's Executive Order No. 9816 of December 31, 1946, vesting full jurisdiction in the Atomic Energy Commission and the confirmation of that Executive Order by Section 241 of the revised Atomic Energy Act of 1954. On the oral argument, appellee's counsel disdained to answer that question. The answer given by the court is clearly erroneous for the reasons already stated.

3. We suggested to appellee's counsel that they state how they could justify the exclusion of evidence offered by the appellants and on their objection rejected by the court to show that when the contracts were being negotiated the parties did not intend to exclude the Hanford area. That question has not been answered by the appellee nor has it adequately been answered by the court in its opinion.

4. We asked that appellee's counsel state why, if the two labor contracts executed on December 19, 1955, and December 24, 1955, and effective January 1, 1956, as written, were intended to include the Hanford area, the Contractors' Committee headed by Mr. Sam C. Guess, its Executive Secretary, up to and including March 16, 1956, were bending every

effort to obtain an amendment to make those contracts applicable to the Hanford area. Appellee's counsel disposed of that inquiry by simply ignoring it, and the opinion of the court furnishes no answer.

5. Questions 5 and 6 appearing in the reply brief, page 31, really involve the same question, and that is, assuming that the appellants are liable to the appellee in some amount, where is the jurisdiction for a joint and several judgment? On the oral argument, appellee's counsel made no answer at all except to say that to refuse to give it a joint and several judgment would be inequitable, implying thereby that this court, by reason of supposed equitable considerations, can amend a jurisdictional statute. The court endeavors to answer this objection by stating that the actions are contractual in nature for the purpose of getting within the coverage of Section 301 of the Labor Management Relations Act of 1947 but that in applying the law to the facts proved, it is permissible to discard established principles of contract law and to the extent necessary substitute legal rules applicable only in tort cases.

Laying aside for the moment disputed questions of facts, if it can be said that the vital facts are seriously in dispute, the opinion filed on July 27, 1957, is erroneous for several reasons.

1. It misconstrues and misapplies Article I, Section 8, Clause 17 of the U.S. Constitution by holding in effect that a federal enclave cannot exist unless the federal jurisdiction is exclusive of all state jurisdiction.

2. It misconstrues and misapplies the Act of Congress of October 9, 1940 (40 USCA, Section 255) which furnished the only authority for the Secretary of War writing the letter of November 8, 1943 (Ex. 20) to the Governor of the State of Washington.

3. It fails to give effect to the Atomic Energy Act of 1946 as amended and the Executive Order No. 9816 issued December 31, 1946, by the President as specifically directed by that Act of Congress.

4. It misconstrues and misapplies Rule 20-A, Federal Rules of Civil Procedure, which furnished the only authority for joining the two local unions in a single action and is in direct conflict with the decision of the United States Court of Appeals of the District of Columbia (*Lansburgs & Bros. Inc. v. Clark,* 127 F.(2d) 331) which correctly construes that rule.

5. It misconstrues and misapplies Section 301 of the Labor Management Act of 1947 (Taft-Hartley Act) and in effect is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit (*Rock Drilling, etc. v. Mason,* 217 F.(2d) 687) which correctly construes that Act.

6. When Rule 20-A, Rules of Civil Procedure, and Section 301 of the Labor Management Act of 1947 are read together, there is no authority for a joint and several judgment even though it be conceded that one local union or the other local union is liable to the appellee in some amount.

In submitting this petition for a rehearing *en banc,* we realize that it is more lengthy and detailed than would ordinarily be acceptable to the court. We believe

it is justified in this case, not primarily because of the excessive judgment against these two local unions, but more particularly because of questions of law involved and arising out of the Constitution and statutes of the United States.

Rule 23 of this court, the pertinent provisions of the Federal Judiciary Act, and the decision of the United States Supreme Court in *Western P.R. Corp. v. Western P.R. Corp.*, 345 U.S. 247, 97 L.ed. 986, pursuant to which Rule 23 in its present from was adopted, clearly contemplate that from time to time cases will arise that merit consideration of the entire court. We respectfully submit that this is one of those cases.

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CERTIFICATE OF COUNSEL

STEPHEN V. CAREY, of counsel for the appellant, Teamsters Union Local 839, and R. MAX ETTER, counsel for the appellant, International Union of Operating Engineers Local 370, each certifies that in his judgment the foregoing petition for rehearing *en banc* is well founded and is not interposed for delay.

STEPHEN V. CAREY
R. MAX ETTER